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REINHART BOERNER VAN DEUREN S.C.
ATTN: LINDA KASULKE, DOCKET COORDINATOR
1000 NORTH WATER STREET
SUITE 2100
MILWAUKEE, WI 53202

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| EXAMINER |
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THAKUR, VIREN A

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte AARON STRAND, KARL L. LINCK, JUDY FISCHER,
THOMAS J. SPAETH, and JERRY D. KOLBE

Appeal 2009-013725
Application 09/804,403
Technology Center 1700

Before ADRIENE LEPIANE HANLON, CATHERINE Q. TIMM, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL ¹

I. STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from the Examiner's
decision to reject claims 1, 2, 6-9, 14, 16, 18, 19, 75, 79, 82-86, 93, 104,

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

107-112, 122-128, and 130-147. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

Appellants' invention relates to reclosable bags that incorporate tamper evident, hermetic seal, and reclosable fastener assemblies of the slider or zipper type, particularly for use with food products (Spec. 1: 9-20).

Claim 1 is illustrative:

1. A reclosable bag for filling with at least one food product, said reclosable bag comprising:

a single sheet of web material having first, second, third, and fourth edges wherein said first and second edges are respectively located opposite each other in said single sheet of web material and said third and fourth edges are respectively located opposite each other in said single sheet of web material, said single sheet of web material comprising a fold located therein intermediate said first and second edges of said single sheet of web material to define two opposite sides of said reclosable bag, said single sheet of web material also having two areas of structural weakness that are respectively located on opposite sides of said fold, said first and second edges of said single sheet of web material being located adjacent each other to define an opening therebetween which is distally located with respect to said fold; and

a reclosable fastener structure having first and second opposite ends and comprising two releasably engageable tracks each having a skirt structure of skirt web material extending therefrom, said reclosable fastener structure being located in said fold with said skirt structures respectively extending toward said first and second edges of said single sheet of web material;

said skirt structures each including a distal margin;

wherein said reclosable fastener structure has a notch located at a corner at each of said first and second ends, said

notches defining where a corner portion of said reclosable fastener structure that includes an end portion of said releasably engageable tracks has been removed, and wherein the periphery of said notches has been sealed;

said distal margins of said skirt structures being respectively coupled to said web material on said opposite sides of said reclosable bag at opposed locations which are respectively located between said areas of structural weakness and said opening;

said releasably engageable tracks of said reclosable fastener structure extending past said areas of structural weakness and into said fold structure;

said two opposite sides of said reclosable bag being sealed at said first and second edges of said single sheet of web material to define sides of said reclosable bag, said reclosable bag being capable of being filled with at least one food product through said opening intermediate said first and second edges of said single sheet of web material, following which said first and second edges of said single sheet of web material are sealed together to enclose the at least one food product inside said reclosable bag.

The Examiner relies upon the following evidence:

| <u>First Named Inventor</u> | <u>Document No.</u> | <u>Issue or Pub. Date</u> |
|-----------------------------|---------------------|---------------------------|
| Boeckmann | US 4,846,585 | Jul. 11, 1989 |
| Van Erden | US 4,759,642 | Jul. 26, 1988 |
| Herrington | US 5,131,121 | Jul. 21, 1992 |
| Kuge | US 5,364,189 | Nov. 15, 1994 |
| Morgan | US 5,442,837 | Aug. 22, 1995 |
| May | US 5,725,312 | Mar. 10, 1998 |
| Hayashi | US 6,074,097 | Jun. 13, 2000 |
| Stolmeier | US 6,257,763 B1 | Jul. 10, 2001 |
| Buchman | US 6,287,001 B1 | Sep. 11, 2001 |
| Belmont | US 6,327,754 B1 | Dec. 11, 2001 |

The Examiner maintains, and Appellants seek review of, the following rejections:

1. The rejection of claims 1, 2, 6-9, 14, 18, 19, 75, 79, 82-86, 104, 107-112, 122-128, and 130, 132, 134-137, and 142-147 under 35 U.S.C. § 103(a) as unpatentable over Belmont in view of Stolmeier, Herrington, Buchmann, Morgan, Van Erden, and Kuge;
2. The rejection of claims 16, 93, 131, 138, 139, and 141 under 35 U.S.C. § 103(a) as unpatentable over the references as applied above to the independent claims and further in view of Hayashi;
3. The rejection of claim 133 under 35 U.S.C. § 103(a) as unpatentable over the references as applied above to the independent claims and further in view of May; and
4. The rejection of claim 140 under 35 U.S.C. § 103(a) as unpatentable over the references as applied above to the independent claims and further in view of Boeckmann.

For the first rejection, Appellants focus their arguments under separate headings on particular claim limitations common to all the independent claims. Thus, no sufficiently distinct argument is made with respect to the rejected claims (Br. 19-61). Accordingly, we decide this Appeal on the basis of representative independent claim 1.

Further, although dependant claims 16, 93, 131, 139, 141, dependent claim 133, and dependent claim 140 stand rejected separately from the independent claims, Appellants provide no arguments in addition to the arguments made with respect to the independent claims (Br. 61-63). Thus, we do not address these rejections separately.

II. ISSUES ON APPEAL

A first issue on appeal arising from the contentions of Appellants and the Examiner is: does the evidence support the Appellants' view that the Examiner erred in concluding that a bag made from a single folded sheet web material with integral areas of structural weakness located below a slider and adjacent the skirt of a fastener structure, as recited in claim 1, would have been obvious to one of ordinary skill in the art based on the teachings of Belmont and Stolmeier? We answer this question in the negative.

A second issue on appeal arising from the contentions of Appellants and the Examiner is: does the evidence support the Appellants' view that the Examiner erred in concluding that notches, in which a periphery of the notches has been sealed, as recited in claim 1, would have been obvious to one of ordinary skill in the art based on the teachings of Belmont, Herrington, Buchman, Morgan, Van Erden, and Kuge? We answer this question in the negative.

III. ANALYSIS

We adopt the Examiner's findings in the Answer as our own and add the additional findings of fact appearing below for emphasis.

Appellants contend that a person of ordinary skill in the art would not have combined the teachings of Belmont and Stolmeier as the Examiner did, as such a modification would be "unintuitive" (Br. 23). We disagree.

The Examiner's rejection cogently concludes that it would have been obvious to one of ordinary skill in the art to modify the bag taught by Belmont to provide lines of weakness and in the location with respect to the zipper as taught by Stolmeier "for the purpose of facilitating the removal of

the hood/covering structure [taught by Belmont] and for facilitating access to the reclosable fastener structures after removal of the fold” (Ans. 7).

“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). The question to be asked is “whether the improvement is more than the predictable use of prior art elements according to their established functions?” *KSR*, 550 U.S. at 417.

We find the Examiner's reasoning to be sufficient to establish a prima facie case of obviousness. Since Stolmeier teaches the use of perforations in the disclosed location to facilitate the removal of tamper evident material (Ans. 6; Stolmeier, col. 3. 1. 65 – col. 4, 1. 1), the modification proposed by the Examiner is no more than the predictable use of known perforations in a known position with respect to a zipper structure according to their established functions.

Although the Appellants allege that the Examiner’s proposed combination would require “radical changes” in the construction of Belmont, Appellants fail to elaborate as to what these changes may constitute (Ans. 23). Accordingly, the Appellants’ allegation is not probative of error.

We further agree with the Examiner that Appellants' arguments directed to “high speed manufacturing equipment” is not persuasive, as the claims are silent as to any particular manufacturing process for arriving at the claimed reclosable bag. *See In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (“Many of appellant’s arguments fail from the outset because . . . they are not based on limitations appearing in the claims.”).

Accordingly, the evidence supports the Examiner's conclusion that a bag made from a single folded sheet web material with integral areas of structural weakness located below a slider and adjacent the skirt of a fastener structure, as recited in claim 1, would have been obvious to one of ordinary skill in the art based on the teachings of Belmont and Stolmeier.

Appellants further contend that the notches 63 taught by Belmont are not "notches" within the meaning of claim 1, since Appellants' Specification identifies "notches" as "radiused portion missing from fastener assembly" as shown in Figure 7 (Br. 25-26; Reply Br. 7). Appellants further contend that the references, which collectively teach just sealing the ends of the respective fasteners, do not disclose notches in which the periphery of the notches has been sealed, as recited in claim 1 (Br. 26-29; Reply Br. 7). We disagree.

"It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005). During examination, "claims . . . are to be given their broadest reasonable interpretation consistent with the specification, and . . . claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art." *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (quoting *In re Bond*, 910 F.2d 831, 833 (Fed. Cir. 1990)).

Claim 1 states that "notches defining where a corner portion of said reclosable fastener structure that includes an end portion of said releasably engageable tracks has been removed" (claim 1). Thus, claim 1 specifically defines notches by the removal of a portion of the zipper tracks. Claim 1

does not require that the notches be “radiused,” and we decline to read into the claim any narrower requirement from Appellants’ Specification. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (“[L]imitations are not to be read into the claims from the specification.”).

Accordingly, we agree with the Examiner that notches 63 as taught Belmont, in which a portion of the track is removed for convenient side sealing of the bag (Belmont, col. 4, ll. 53-57), constitutes “notches” within the meaning of claim 1.

The Examiner has provided sufficient evidence that it was known in the art to form a seal around the ends of a track (Ans. 19-20). In fact, we need go no further than the teachings of Belmont for such a teaching (Ans. 19; Belmont, col. 5, ll. 9-25 and col. 7, ll. 31-33). Considering that notches need only be portions where the fastener track has been removed, sealing the ends of the track taught by Belmont would constitute sealing the periphery of the notches 63, within the meaning of claim 1.

Accordingly, the evidence supports the Examiner’s conclusion that notches, in which a periphery of the notches has been sealed, as recited in claim 1, would have been obvious to one of ordinary skill in the art based on the teachings of Belmont, Herrington, Buchman, Morgan, Van Erden, and Kuge,

IV. CONCLUSION

On the record before us² and for the reasons discussed above, we sustain the rejections maintained by the Examiner.

² Only those arguments actually made by Appellants have been considered in this decision. Arguments which Appellants could have made but chose not to make have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2008).

V. DECISION

We affirm the Examiner's decision.

VI. TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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REINHART BOERNER VAN DEUREN S.C.
ATTN: LINDA KASULKE, DOCKET COORDINATOR
1000 NORTH WATER STREET
SUITE 2100
MILWAUKEE, WI 53202